IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 4543 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KUSUMBEN VIPINCHANDRA SHAH & 1 - Appellant(s)
Versus
ARVINDBHAI NARMADASHANKAR RAVAL & 2 - Defendant(s)

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Appearance :
MR MTM HAKIM for Appellant(s) : 1 - 2.
NOTICE SERVED BY DS for Defendant(s) : 1 - 3.
MR ANIL C THAKORE for Defendant(s) : 1,
MR HASMUKH THAKKER for Defendant(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 08/02/2007
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal at the instance of the claimants under Section 173 of the Motor Vehicles Act, 1988 is directed against the judgment and award dated 20.2.2006 of the Motor Accident Claims Tribunal, Baroda in MAC Petition No.691 of 1995 in so far as the Tribunal after having determined the amount of compensation at Rs.3,15,000/- has made the award for only Rs.1,26,000/- with proportionate costs and interest at the rate of 7.5% per annum.

2. The appellants are the parents of one Sanjiv, a young qualified engineer who died at the age of 24 years in a motor vehicle accident between a jeep belonging to the Gujarat Electricity Board where the deceased was employed as an Electrical Engineer and a truck. The jeep belonging to the Gujarat Electricity Board and registered in the name of its Executive Engineer (Transmission) was insured by respondent No.3- New India Assurance Co. Ltd.. The parents of the deceased filed the claim petition for compensation of Rs.10 lakhs. Respondent No.3 – Insurance Company contested the claim petition and contended in its written statement at Exh.31 that since the driver of the truck involved in the accident was not joined, the claim petition was liable to be dismissed for non-joinder of a necessary party. The contention was also pressed in service at the hearing of arguments. However, relying on the decision of another Division Bench of this Court in **Amarsi Jugabhai & Ors. vs. Vijayaben Hemantlal**

Dhulia, 1996 (1) GLH 1007 = 1996 (3) GLR 493, the Tribunal overruled the objection and held that this was a case of composite negligence and not a case of contributory negligence because the deceased was not driving either of the two vehicles, but the deceased was a mere passenger in the jeep insured by respondent No.3-Insurance Company. On facts, the Tribunal attributed 60% responsibility of the accident to the truck driver and 40% to the jeep driver. The Tribunal thereafter determined the amount of compensation at Rs.3,15,000/-, but on the ground that the negligence of the jeep driver was only 40%, the Tribunal slashed the amount of compensation payable by the driver, owner and insurer of the jeep to Rs.1,26,000/-. The claimants are aggrieved by this slashing of compensation.

3. Mr MTM Hakim, learned counsel for the appellant-claimants has submitted that the settled legal principles enunciated by this Court with utmost clarity have not been properly appreciated by the Tribunal. It is submitted that after rightly overruling the preliminary contention urged on behalf of respondent No.3 that the claim petition was not maintainable on account of non-joinder of the driver/owner of the truck, the Tribunal erred in not making the award for the entire compensation amount against the present respondents i.e. driver/owner/insurer of the jeep.

4. On the other hand, Mr Hasmukh Thakker with

Mr Palak Thakker for respondent No.3-Insurance Company (insurer of the jeep) has supported the award of the Tribunal and submitted that since the claim petition was filed under Section 166 of the Act, the liability to pay compensation arises only upon proof of negligence and, therefore, once the negligence of the jeep driver was determined at only 40% the award of the Tribunal requiring respondent No.3-Insurance Company to pay only 40% of the compensation amount determined by the Tribunal is legal and proper.

5. In **Amarsi Jugabhai & Ors. vs. Vijayaben Hemantlal Dhulia, 1996 (1) GLH 1007 = 1996 (3) GLR 493,** this Court was concerned with a similar controversy involving the accident between a truck and a car. The claim petition was filed only against the driver/owner/insurer of the truck without impleading either the heirs of the driver-cum-owner of the car who died in the accident or the Insurance Company with which the said car was insured. The Tribunal found that the accident took place on account of composite negligence of the truck driver and the deceased car driver determined by the Tribunal in the ratio of 75:25 percent respectively. The Tribunal fastened joint and several liability to satisfy the award of the entire compensation amount on the driver/owner/insurer of the truck. The driver/owner/insurer of the truck filed First Appeal before this Court contending that in view of the specific plea raised by the appellants before the trial Court that the driver/owner/insurer of the car

were necessary parties, the Tribunal ought not to have made the award against the insurer of the truck to pay the entire amount of compensation.

6. After examining all the previous decisions of this Court and also the leading books on the subject, including Pollock, the Division Bench held that where a person is injured without his own negligence but on account of the negligence of the two drivers of the colliding vehicles, it is a case of composite negligence and the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rule as to remoteness of damage, he is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty or contribution or indemnity as between those persons, though in any case he cannot recover in the whole more than his whole damages. He has a right to recover the full amount of damage from any of the joint tort-feasors. Those who are sued cannot insist on having the others being joined as defendants because the liability of the joint tort-feasors is joint and several. Every wrong doer is liable for the whole damage and it does not matter whether they acted between themselves as equals. This Court further held that the defendant who is compelled to pay the entire amount of damages decreed has a right to contribution from the other wrong doer. The liability in the case of composite negligence, normally should not be apportioned, as

both wrong doers are jointly and severally liable for the whole loss. Rule of apportionment of liability applies in a case of contributory negligence, i.e. where the injured himself is also guilty of negligence.

The Division Bench also dealt with the discordant note sounded in Gujarat State Road Transport Corporation vs. Gurunath Shahu & Ors., 1989 ACJ 314 and held that when the opponents in the claim petition apply for bringing the other joint tort-feasor on record, the Tribunal should normally allow such application but the claim petition does not cease to be maintainable merely because all the joint tort-feasors are not joined as party defendants. It further held that the finding given by the Tribunal in such a case regarding apportionment of liability would be tentative for the purpose of subsequent proceeding which may be filed by the defendant tort-feasor against the other joint tort-feasor who was not a party to the first proceeding. But this tentativeness for the purpose of contribution between two joint tort-feasors does not at all affect the right of the plaintiff-claimant to recover the full damages from the defendant tort-feasor against whom the first proceeding is filed.

7. In view of the above settled legal position, we find considerable substance in the submission of the learned counsel for the appellant-claimants that the Tribunal after having determined the compensation

at Rs.3,15,000/- with proportionate costs and interest erred in slashing down the compensation to Rs.1,26,000/-.

8. The appeal is accordingly allowed. The amount of compensation awarded by the Tribunal is enhanced to Rs.3,15,000/- and it is held that the appellant- original claimants are entitled to recover the entire amount of compensation with proportionate costs and interest at the rate of 7.5% per annum jointly and severally from all the respondents herein.

Respondent No.3-Insurance Company shall deposit the additional amount of compensation as per this judgment within two months from the date of receipt of certified copy of this judgment.

It is, however, clarified that it will be open to the respondents herein to institute appropriate proceedings against the other tort-feasors in accordance with the principles laid down by this Court in **Amarsi Jugabhai & Ors. vs. Vijayaben Hemantlal Dhulia, 1996 (1) GLH 1007 = 1996 (3) GLR 493.**

9. The appeal is accordingly allowed in the aforesaid terms.

(M.S. SHAH, J.) (AKIL KURESHI, J.)

zgs/-